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ABSTRACT

This paper--part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002--addresses the question of how and to what extent institutions of higher learning could be held liable for negligence involving students. The paper is, mainly, a review of recent case law related to the liability of higher education institutions and asks whether current institutional policies create a heightened risk of legal liability for negligence involving students. The review looks at the following broad topics: (1) third-party assaults on students; (2) hazing activities; and (3) alcohol-related injuries. From the review, the paper concludes that judges have recognized that once higher education administrators abandoned in loco parentis supervision of adult students and recognized the students' rights to control and regulate their own lives, colleges and universities could no longer be charged with a special duty of care to supervise student activities. Clearly, the college is not an insurer of the safety of its students nor an enforcer of student morality. Nevertheless, the college has a duty to regulate and supervise foreseeable dangerous activities occurring on its property. (Contains 55 references, all court cases.) (WFA)

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November 2002

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Negligent Liability Issues Involving Colleges and Students: Does an Ethic of Caring Heighten Institutional Liability?

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Since the landmark decision in *Bradshaw v. Rawlings* (1979), the question of how and to what extent institutions of higher education could be held liable for negligence involving students has preoccupied courts. In an earlier era, sovereign immunity regularly insulated higher education institutions from liability. As state legislatures abrogated immunity doctrines, judges initially immunized colleges and universities by rejecting an in loco parentis notion of the relationship between student and institution. Over time, judges retreated from principles that effectively denied relief to injured student-plaintiffs and began to extend liability, initially in cases involving inspection and maintenance of premises. Institutional liability has since been extended to the duty of care associated with the landlord-tenant relationship, particularly in instances involving assaults by third parties. In a limited number of cases, judges have recognized a special duty relationship predicated on the foreseeable nature of a risk of injury and a judicially imposed duty of reasonable care applicable to institutions of higher education. [See Robert Bickel and Peter F. Lake, "The Emergence of New Paradigms in Student-University Relations: From 'In Loco Parentis' to Bystander to Facilitator," 23 J.C.& U. L. 755 (1997)] This paper reviews recent case law related to the liability of higher education institutions and asks whether current institutional policies create a heightened risk of legal liability for negligence involving students.

Third-Party Assaults on Students

Evolving out of cases based on premises liability, institutional liability for attacks on students by third parties has been prominent in the case law. Students who are subject to attack allege a negligent failure by the institution to provide adequate safety and security. The weight of judicial opinion, congruent with the Restatement (Second) of Torts (1964) emphasizes that there is no duty to control the conduct of a third person or to prevent him or her from causing harm unless a special relationship exists that imposes such a duty. For example, in *Ruchalski v. Schnectady County Community College (App.Div. 1997)* a student who was injured when struck by a traffic cone thrown by another student in a college cafeteria could not recover damages on a theory that the college owed a special duty of care. The court noted that the college could not have foreseen the act that led to the injury and no special duty to protect the student could be established. The general rule extrapolated from the case law is that there is no duty to protect a student from a third party attack or injury unless the institution, acting as a landlord, had reason to foresee the likelihood of criminal conduct that would endanger the safety of the student-tenant

Hall v. Board of Supervisors (1981) reflects the limited view of foreseeability held by courts in the early 1980s. In *Hall*, a student shot by a non-student in the lobby of her dormitory claimed that the institution had breached its duty to protect her (1) by requiring her to live on campus without warning her of the dangers to which she would be subjected, (2) by failing to maintain adequate security, and (3) by failing to bar her assailant from the campus. In its decision, the state appeals court asserted that prior

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isolated criminal activities did not create a duty for the institution to warn all residents of probable dangers, asserting there was "...no proof that living on campus increased the hazard above the ordinary" (p. 1126). The court held that in cases where spontaneous unforeseeable violence occurs, unless a causal relationship is established between security inadequacies on the college's part and an injury sustained to the student, negligence would not be established: "Even the most sophisticated security forces are powerless to prevent a spontaneous, sudden and unprovoked act of violence" (p. 1126).

However, as attacks on students in residence halls received widespread national attention, judges, motivated by social policy concerns, began to place increased responsibility on institutions to protect students. This greater potential for institutional liability, predicated on an apparent judicial expansion of the scope of foreseeable risk, was evident in the case of *Mullins v. Pine Manor College* (1983). In *Mullins*, a female student who was raped on campus after being abducted from her dormitory room by an unidentified assailant prevailed on her claim that the college, as landlord, was negligent. The Supreme Judicial Court of Massachusetts affirmed the trial court's decision holding the college negligent, and determined that the college had a duty to protect the student primarily because there was a general community consensus that the college would take steps to provide security despite prevailing perceptions of college students as adults.

> Of course, changes in college life, reflected in the general decline of the theory that the college stands in loco parentis to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm. (p. 335-336)

The appellate court reasoned that since the college had establish a security force, it had an obligation to ensure a degree of care grounded in the theory that "...a duty voluntarily assumed must be performed with due care" (p. 336). In addressing the college's argument that the incident was not foreseeable since there had not been any previous incidents of third party assaults in campus residence halls, the court asserted that, "Prior criminal acts are simply one factor among others that establish the foreseeability of [illegible] act of the third party" (p. 336). Because the college had routinely warned students during orientation of the dangers inherent to being housed near the city of Boston, there was sufficient evidence that the risk of a criminal act was both foreseeable and foreseen by the college.

Several cases that followed *Mullins* support the contention that the landlord-tenant relationship creates a special duty to protect students residing in residence halls. In the case of *Cutler v. Board of Regents of State of Florida* (1984), a state appeals court allowed a female state university student who was assaulted and raped in her dormitory room to amend her complaint, asserting that "recent Florida decisions have held that a landlord, who recognizes and assumes the duty to protect his tenants from foreseeable criminal conduct, may be liable if he fails to take reasonable precautions to prevent injury to his tenants from this conduct" (p. 414-415). In *Miller v. State* (1983), the Court of Appeals of New York

affirmed negligence on the part of the university for failing to protect a female student from rape in a residence hall. The appeals court noted:

> As a landowner, the State must act as a reasonable [person] in maintaining property in a reasonably safe condition in view of all the circumstances....Under this standard, a landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants....Thus, defendant here had a duty to take the rather minimal security measure of keeping the dormitory doors locked when it had notice of the likelihood of criminal intrusions. (p. 883)

Negligence predicated on the landlord-tenant relationship was affirmed in *Nero v. Kansas State University* (1993), in which a female student who was sexually assaulted in her residence hall persuaded the Supreme Court of Kansas that Kansas State University owed a duty of reasonable care to students in residence halls once it exercised its discretion to make such housing available to students. While declining to hold that the university-student relationship itself imposes a duty on institutions to protect students, the court did rule that a university has a duty to regulate and supervise foreseeable dangers occurring on its property. The court ordered remand, finding that the trial court erred in granting summary judgment to the institution, and emphasized that the trial court must resolve the question of whether, at the time of the attack, the institution's agents should have foreseen the attack on the student.

Attacks on students that occur on the campus, but outside of resident halls, present greater challenges for student-plaintiffs, both because the landlord-tenant relationship applicable to residence halls is unpersuasive and because it is more difficult to establish a foreseeable risk. This reluctance to impose a duty on colleges to protect students or control their behavior while on the campus is reflected in numerous cases. In *Smith v. Day* (1987), an attempt was made to hold Norwich University responsible for injuries sustained by plaintiffs shot on campus by a cadet who attended the University. [See also, *Adams v. State*, (1994) in which an invitee on the campus who was struck by a bullet allegedly fired from a residence hall was unable to establish a special duty relationship based on a duty to protect her while attending a cultural event sponsored by the institution.] The plaintiffs argued that a special duty relationship existed between the student and the university because of the degree of control exerted by the University over its students via institutional rules and regulations. The Supreme Court of Vermont, however, agreed with earlier judicial opinions that creating such a duty would go against public policy.

> In the instant case, compelling public policy reasons exist against extending the common law understanding of duty. First, most college students, including the defendant Day, are adults and must take full responsibility for their actions....Second, it is unrealistic to expect the modern American college to control all of the actions of its students....Third, making a university liable for this type of action would inevitably lead to repressive regulations and a loss of student freedoms, thus contravening a goal of higher education: "the maturation of students." (p. 599)

In *Rabel v. Illinois Wesleyan University (1987)*, an Illinois appeals court reviewed injuries sustained to a female student at Illinois Wesleyan University after a fraternity student forcibly grabbed her from the lobby of her residence hall and attempted to run with her through a gauntlet of his fraternity peers. The plaintiff received serious injuries to the head when the male student tripped and dropped her

onto a sidewalk. She alleged that the university, "due to its policies, regulations and handbook created a special relationship with its students and a corresponding duty to protect its students against the alleged misconduct of a fellow student" (p. 356). The appeals court concluded that the imposition of such a duty on the university was unrealistic.

> (W)e have considered the likelihood of the injury from the existence of the condition here, the magnitude of guarding against it and the consequences of placing the burden on the defendant. Upon consideration, we do not believe that the university, by its handbook, regulations, or policies voluntarily assumed or placed itself in a custodial relationship with its students, for purposes of imposing a duty to protect its students from the injury occasioned here. The university's responsibility to its students, as an institution of higher education, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others. (p. 360-361)

Absent substantial evidence of a known foreseeable risk, judges have been unwilling to impose institutional liability based on the recognition of a special duty relationship. Two cases with dramatically different outcomes serve to illustrate this principle. In *Klobuchar v. Purdue University (1990)*, a university student who was injured after her husband kidnapped her from campus brought an action against the university for failing to provide adequate security. An Indiana appeals court affirmed summary judgment in favor of the university after determining that there was no material fact that gave rise to a special duty to protect the plaintiff. In its decision, the court emphasized that even in light of a duty to the plaintiff that would be the same general duty afforded to the public, there was nothing that would have alerted the University to any possible danger as the plaintiff admitted that "...neither she, nor anyone else, told the University that her husband might be a threat to her" (p. 171).

In contrast, in the case of *Sharkey v. Board of Regents (Neb. 2000)*, a state university was held to owe a duty of care to a husband and wife, both of whom were students, in an instance in which the husband was stabbed during a confrontation with another student. The confrontation arose from the third student's alleged harassment of the wife while on the campus, which had been reported to campus security. When campus security took no steps to address the harassment, the husband intervened and was stabbed in an attack. The Supreme Court of Nebraska held that the university owed a duty of care to the students as invitees and reasoned that the institution's police force had been made aware of the harassing student's specific behavior on more than one occasion and knew of instances of criminal activity on the campus. It found that it was reasonable to belief the harassing behavior would escalate into violence, and held that the institution had a duty to take reasonable, precautionary measures to protect the students.

When addressing student claims of negligence that involve injuries off campus, judges are reluctant to create a duty of care either to maintain a safe environment or to require the institution to warn students. This general rule is clearly applicable to instances when students leave the campus to engage in activities unrelated to the institution's sponsored programs or activities *[See generally, Conroy v. Marquette University (1998) and Hartman v. Bethany College (1991)]*.

However, student-institutional relationships involving some degree of supervision or control are considered one form of special duty relationship under the Restatement, and courts have recognized that higher education institutions owe a legal duty to students to provide proper instruction and adequate supervision in classroom contexts that involve high risks, foreseeable harm, and the instructor's special expertise. [See generally, *Fu v. State (2002)* (explosion in chemistry laboratory); *Garrett v. Northwest Mississippi Junior College (1996)* (injury in using milling machine); *Delbridge v. Maricopa County Community College (1994)* (fall from utility pole in training class).]

Whether the degree of supervision or control creating a special duty relationship extends to student participation in off-campus programs has been the subject of recent judicial speculation leading to mixed results. In *Bloss v. University of Minnesota (1999)*, a student participating in an international study abroad program was sexually assaulted by a taxi cab driver. Despite contentions that the sponsoring institution was negligent in failing to secure housing closer to the program site, failing to provide safe transportation for students, failing to inform of the risks to students, and failing to protect students from a foreseeable harm, the state appeals court affirmed summary judgment for the institution on the basis of qualified immunity. The court reasoned that the suit arose out of discretionary functions performed by state officials in planning and implementing an international program intended to provide cultural immersion for students. Similarly, in *McNeil v. Wagner College (1998)*, a student injured in a slip and fall on ice while attending an overseas college program could not establish a claim for negligence based on an institutional employee's voluntary act of assisting her with medical care. In this case, the student alleged negligent supervision of her medical care when the director of the international program sought to act as an interpreter for her in the Austrian hospital where she was treated. The court rejected the claim based on the general principle that in loco parentis does not apply at the college level.

However, recent cases suggest that the liability for sponsoring off-campus programs can arise under circumstances in which a duty of care is applicable and the institution could or should reasonably foresee a risk of harm. In *Nova Southeastern University v. Gross (2000)*, the Supreme Court of Florida ruled that a university could be found negligent if it assigned a student to a mandatory off-campus internship site that institutional officials knew to be unreasonably dangerous. The graduate student was abducted from the parking lot of her assigned internship site, robbed and assaulted. University officials had been made aware of a number of criminal assaults that had occurred at or near the internship site, but provided the student with no adequate warning of the danger. While refusing to adopt a general duty of supervision for the safety of students, the court found that the institution had a duty to use ordinary care in providing educational services and programs. Noting that the case was not based on premises liability, the court emphasized that the "special relationship" in this case was limited to the foreseeable risk involved, the institution's knowledge of that risk, and the failure to warn the student of the known danger.

> As Nova had control over the students' conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the. . .correlative duty of acting reasonable in making those assignments. In a case such as this one, where the

> university had knowledge that the internship location was unreasonably dangerous, it should be up to the jury to determine whether the university acted reasonably in assigning students to do internships at that location. (p. 89)

The institution's duty may also extend to instances of negligent hiring. In *Harrington v. Louisiana State Board (1998)*, a student in a culinary apprenticeship brought an action against a community college alleging that sthe director of the program had raped her The director admitted that he had been arrested and convicted for raping the student in his car after taking her with him on a series of visits to arrange student internships with local restaurants. Finding that the institution's agents made no inquiries about the director's past criminal behavior, which included several arrests and convictions, before hiring him, a state appeals court reversed a summary judgment motion on behalf of the college and held the institution was liable for negligently hiring the director.

Hazing Activities

Several recent decisions involving student injuries caused by hazing have departed from the presumption that institutions owe no duty to students. In *Furek v. University of Delaware (1991)* the Supreme Court of Delaware determined that the magnitude of the foreseeable risk and the institution's policies towards hazing imposed a duty of reasonable care for the safety of students. *Furek* involved a student injured in a hazing-related accident at a fraternity on the University of Delaware campus. In its decision, the court emphasized that judges have been reluctant to impose institutional liability because higher education institutions are not insurers of students' safety. However, the *Furek* court reasoned that the university's policies against hazing (which reflected state law mandates), the security system in place to protect students, and the university's knowledge of previous hazing incidents in fraternities created such a duty.

> The evidence in this record, however, strongly suggests that the university not only was knowledgeable of the dangers of hazing but, in repeated communications to students in general and fraternities in particular, emphasized the university policy of discipline for hazing infractions. The university's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became "an indispensable part of the bundle of services which colleges...afford their students." (p. 520).

The *Furek* decision concluded that changing societal attitudes toward hazing suggest that institutions are not free from all obligations to protect their students. On balance, the court found the likelihood of injury during hazing activities occurring on university campuses to be greater than the utility of university inaction. Imposing liability on the institution was based on the belief that the university had a degree of control over its premises, including the fraternity house, which was supported by its involvement in the regulation of fraternity life. This control, combined with the cumulative evidence that the incident was foreseeable, created a duty to protect the student from harm.

Adopting a different rationale justifying institutional liability for hazing, the Vermont Supreme Court, in *Brueckner v. Norwich University (1999)* examined the experience of a student attending a military college who was subjected to incidents of hazing that included verbal and physical harassment by

upperclassmen known as "the cadre." The student reported the hazing incidents to university officials, but eventually withdrew from the institution, thinking that his situation would not improve. His scholarship was terminated and he brought suit against the institution. A lower court found the institution liable for assault and battery, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligent supervision.

The Vermont Supreme Court affirmed the lower court's decision holding the institution liable for the tortuous conduct of the cadre and affirmed an award of compensatory damages. Applying the doctrine of respondeat superior, the court ruled that the university would be vicariously liable for the actions of the cadre if these cadets were acting within the scope of employment as agents of the institution. Although the institution had adopted policies against hazing, it had charged the cadre members with indoctrinating and orienting new students. The court reasoned that a jury could find that the members of the cadre were performing a general duty to indoctrinate and orient on behalf of the institution and the cadre's hazing activities were within the scope of employment. The institution was liable for the tortuous acts of the cadre both because the institution had authorized the indoctrination and orientation and because the institution was negligent in meeting a duty of reasonable care to control and supervise the cadre. [But see *Alton v. Texas A & M University (1999)* in which a federal appeals court rejected a claim that hazing by members of university's military training organization violated a student's due process rights.)

The Supreme Court of Nebraska used reasoning that paralleled the *Furek* decision in *Knoll v. Board of Regents (1999)*. In this case, a student who was injured in a hazing activity filed suit against the university, alleging that it acted negligently in failing to enforce prohibitions against hazing, consumption of alcohol, and physically abusive behavior. The state supreme court reversed a grant of summary judgment to the university, finding that the hazing activities were foreseeable by the university, which had knowledge of previous instances of hazing by other fraternities and of specific instances of possession of alcohol, alcohol abuse and assaults involving the fraternity that had subject the student to hazing. The court adopted the view that it is the risk reasonably to be perceived that is the determinant of whether a duty is owed.

Institutional liability for hazing activities increases with the degree of foreseeable risk involved. Recent cases in which individuals and fraternal organizations have been subject to suit for hazing that resulted in injuries to student may presage a heightened risk of liability [See *Nisbet v. Bucher (1997)* (Proximate cause was established by allegation student was forced to drink excessive amount of alcohol and was abandoned in a state of excessive intoxication by fraternity members.) and *Oja v. Grand Chapter of Theta Chi Fraternity (1997)* (Summary judgment precluded by allegation that pledge's drinking was imposed upon pledges as an implied condition of membership.)

Athletics

Because of the degree of supervision and control exercised over school sponsored intercollegiate athletic programs, several courts have imposed a special duty relationship in this particular context of

student-institutional relationships. For example, in *Kleinknecht v. Gettysburg College (1993)* a federal appeals court upheld liability specifically predicated on a special duty relationship. After a student who had been recruited to play lacrosse suffered a fatal heart attack during practice, the parents of the student brought a negligence action against the college, arguing that a special relationship existed between the student and the college by virtue of the student's status as a member of the intercollegiate athletic team. A federal appeals court agreed, reasoning that because the student was recruited to play lacrosse and, at the time of his heart attack he was participating in a scheduled athletic practice for a college sponsored intercollegiate team, a special relationship existed that was sufficient to impose a duty of reasonable care.

Having determined that a special relationship existed, the court then reviewed the record to evaluate whether the incident was foreseeable and assess whether a duty of care was owed. The court determined that a member of the College's interscholastic lacrosse team could suffer a serious injury during an athletic event, and concluded the college owed a duty to the student to take precautions against the risks of injury. In making its determination, the federal court clearly intended to set limits on the class of students to which this decision would apply, stating:

> There is a distinction between a student injured while participating as an inter-collegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests, scholastic or otherwise. This distinction serves to limit the class of students to whom a college owes the duty of care that arises here. Had (the student) been participating in a fraternity football game, for example, the College might not have owed him the same duty or perhaps any duty at all. (p. 1368)

Kleinknecht reflects the high degree of control a university must have over the student in order to persuade a court to impose a special duty of care. The court recognized that the College had actively sought out the student's participation on the lacrosse team by recruiting him, and that the student suffered the heart attack while participating in a scheduled and supervised lacrosse team practice. The court also pointed out that the relationship between colleges and student-athletes was not one in which the college was purely a bystander: "We cannot help but think that the College recruited [the student] for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students" (p. 1368).

Following *Kleinknecht*, other courts recognized a special duty relationship applicable to circumstances in which the institution may be said to exercise a greater degree of control over students engaged in sponsored programs. For example, in *Searles v. Trustees of St. Joseph's College (1997)*, a court held that an institution may be liable for injuries to student-athletes in school-sponsored programs when college coaches or trainers are found to have breached a duty to exercise reasonable care for student athlete safety. In this case, a member of a men's basketball team alleged that despite medical advice to the contrary, his college coach and an athletic trainer had insisted that the student continue to play basketball after several knee surgeries. Although the trial court granted summary judgment to the institution on the student's claims, the state appeals court reversed, holding that a duty of adequate

supervision would arise from the level of control exercised by the coach and trainer over the athlete and finding that whether the duty was breached in this case was a question of fact for the jury's resolution.

The fact that an institution does in fact exercise a level of supervision and control over a student-athlete's training and participation in intercollegiate sports can create a duty of care to foresee potential risks. In *Moose v. Massachusetts Institute of Technology (1997)*, a Massachusetts appeals court affirmed a jury verdict in favor of a student-athlete injured while attempting a pole vault under the supervision of his coach. The student had sustained the injury when his heels hooked on the back edge of the landing pit and his head struck the unprotected surface on the track. Using a comparative negligence standard, the jury apportioned the fault proximately causing the injury between the institution and the student. On appeal, the state court emphasized that there was sufficient evidence for the jury to find that the risk of falling over the back of the padded landing pit was foreseeable and the coach's failure to evaluate the potential risk and take affirmative steps to reduce it was negligence. In a case with a similar result, *Trustees of Trinity College v. Ferris (1997)*, a student-athlete participating in rowing practice was injured when his team's scull collided with a scull rowed by the women's team. The women's' scull was in the wrong lane at the time of the accident, violating a navigation rule. Following a jury verdict in favor of the student-athlete on the negligence claim, the defendants appealed, contending that the student had assumed the risk of the activity and pointing the fact that the student had signed a release before participating in the practices. The state appeals court rejected this defense, ruling that the student athlete might have been aware of the general risks inherent in the sport, but a jury could find that he was not aware, and did not assume, the specific risk or harm associated with his injury.

Cases involving student-athletes almost always involve a defense that the student assumed the risk of injury. For example, in *Nova University v. Katz (1993)*, a student at Nova University who severely injured her foot during cheerleading practice brought an action against the university for negligence. The plaintiff alleged that the coach had failed to provide spotters for her when she fell while doing a cheerleading stunt and that he had generally failed to supervise the students. The jury ruled in favor of the student and the university appealed, arguing that the claim should have been barred by the doctrine of assumption of risk.

As a general rule, participants in athletic events properly may be held to have consented, by their participation, to those injury-causing events that are known, apparent or reasonably foreseeable consequences of participation. However, an institution generally has a duty to exercise reasonable care to protect participants from concealed or unreasonably increased risks that could not have been assumed. The state appeals court, while recognizing the risks inherent in cheerleading and assumed by students participating in the activity, pointed out that this assumed risk did not release the university from its responsibility to continue to provide proper supervision and instruction during a practice.

> Here, the cheerleader's conduct in going ahead with a stunt even though she knew spotters were not present may be characterized as implied qualified assumption of the risk. While she may have waived risks inherent in the sport itself, those do not include the failure to have proper supervision and to have spotters. She did not absolve the

school of its responsibility for proper instruction and to properly supervise the activity. (p. 30)

The assumption of risk defense effectively insulated a state university from liability in *Schiffman v. Spring (1994)*. In *Schiffman*, a student on the women's varsity soccer team was injured when her foot became stuck in the mud while playing in a soccer match on the campus of another institution. She brought suit against the institution, alleging that the athletic director and coach were negligent by electing to hold a soccer match on a field that was wet, slippery, and muddy. The university prevailed on a summary judgment motion after the judge concluded that the plaintiff was fully aware of the condition of the field before she voluntarily agreed to participate in the soccer match, thus establishing an assumption of risk. The institution established that plaintiff's injury was not the result of a breach of duty; rather, it was "a luckless accident arising from the vigorous voluntary participation in competitive inter-scholastic athletics" (p. 483- 484). [See also *Rendine v. St.John's University (2001)* for a case in which a cheerleader, injured when she fell while performing a stunt, was held to have assumed the risk of the activity because she was under no compulsion to perform the stunt and had been advised that no spotter was available.]

The limits of institutional liability for negligence in the context of student-athletic injuries are illustrated in cases involving unsanctioned activities and intramural programs. In *Gilbert v. St. John's University (1998)*, a member of an unsanctioned college rugby team was seriously injured in a rugby match with an unofficial team of students from another institution. The student alleged that his institution had a duty to supervise the team, despite the fact that the college had withdrawn sponsorship and financial support for the team six years earlier. The college had also sanctioned the team and threatened to discipline students who played rugby under the guise of the college's sponsorship. The student asserted that the college was aware of the team's activities and had limited its activities to discouraging matches on campus. Adopting the view that courts have refused to impose a duty on institutions to supervise or control student conduct, a federal district court affirmed a magistrate's decision dismissing the student's action and granting summary judgment to the college. The court also emphasized that imposing such a duty when the student is off campus and outside the institution's custody or control is even more unlikely.

Similarly, in *Ochoa v. California State University (1999)*, a case involving a student who was struck by an opposing player in an intramural soccer game, a California appeals court ruled that the institution did not owe a duty to the student simply by organizing and sponsoring the game. The court took the position that soccer is a hazardous recreational activity and fisticuffs between participants were reasonably to be expected. Affirming summary judgment for the institution, the court emphasized,

> It is unclear how the policy of preventing future harm would be fostered by finding a special relationship between universities and the participants in their intramural events, since it is unclear how those events could proceed if every injury suffered by a participant might expose the university to liability. . . .(T)he likely consequences to the community would be the abandonment of intramural sports by colleges and universities, which would serve no one's interest. (at 772)

These cases establish that because of the degree of supervision and control associated with school-sponsored athletic programs, it is possible that a court recognize a special duty relationship. [In one of the few cases rejecting the special duty as applied to student athletes, *Howell v. Clavert (2000),* the Supreme Court of Kansas found that the duty owed to student-athletes is that of a general duty of care, and declined to impose a special duty to provide adequate supervision, instruction, warning, and safe premises for a required activity. The decision, however, affirmed institutional liability under a comparative negligence standard in a case in which two student-athletes were struck from behind by a truck during a mandatory early morning conditioning run.] The university or college may be liable for an injury when it is clear that institutional officials did not exercise reasonable care to protect students from foreseeable injuries. [See *Wallace v. Broyles (1998)* for a case in which the Supreme Court of Arkansas determined that genuine issues of material fact precluded summary judgment in a case in which an athlete's suicide was alleged to have been proximately caused by the illegal and uncontrolled dispensing of controlled drugs by institutional employees.] To be foreseeable, the injury does not have to be specifically foreseen by the university, but need only fall into a general category of injuries were likely to occur during participation in an athletic event. To reduce the risk of liability in these cases, colleges and universities need to substantiate that students were warned and are aware of the risks inherent in engaging in athletic activities, although it is not necessarily to provide notice of the specific manner in which an injury might incur. It is also essential that institutions provide up-to-date training and supervision commensurate with the risks involved in the activity.

Alcohol Related Cases

Although institutional liability for alcohol-related injuries are substantially influenced by state law, judicial decisions confirm that an institution's general awareness of underage drinking on college campuses, or the adoption of university policies and regulations prohibiting such activities and providing for discipline for instances of misconduct, does not increase the risk of liability for these institutions. Dicta contained in decisions involving alcohol-related negligence claims reflect that appellate courts believe that imposing a duty on universities to prevent underage drinking would, in effect, represent a step back toward the creation of an in loco parentis responsibility for students, a step these appellate courts are unwilling to take because such an expectation is unrealistic and against public policy.

The leading case reflecting judicial reluctance to establish institutional liability involving alcohol-related student injuries is *Bradshaw v. Rawlings (1979).* In *Bradshaw*, a federal appeals court held that there existed no special duty relationship between a college and a student that would impose upon the college a duty to control the conduct of a student operating a motor vehicle or to protect a student traveling to and from a class picnic. The injured student had been a passenger in the car of another student who had consumed alcohol at a college-sponsored function off the campus. When the student was injured in an automobile accident on the return trip to the campus, he joined the institution as one of several defendants in a negligence suit. In ruling that " the modern American college is not an insurer of

the safety of its students" (p. 138), the federal appeals court emphasized that "College students today are no longer minors; they are now regarded as adults in almost every phase of community life" (p. 139).

The rationale in *Bradshaw* was followed in *Baldwin v. Zoradi (1981)*. In this case, a student at California Polytechnic State University brought suit against the Trustees of the University and two of its dormitory staff members after she was seriously injured in an automobile accident involving several intoxicated students. The plaintiff alleged that the dormitory staff created a dangerous situation in that they knowingly permitted the students to consume alcoholic beverages in the residence halls and failed to take appropriate steps to control students. A California appeals court concluded that it would be impossible and, in some respects, improper, for the university to be expected to police and eradicate alcohol consumption on the campus.

> Although the consumption of alcoholic beverages by persons under 21 years of age is proscribed by law (citations omitted), the use of alcohol by college students is not so unusual or heinous by contemporary standards as to require special efforts by college administrators to stamp it out. Although the university reserved to itself the right to take disciplinary action for drinking on campus, this merely follows state laws. The same may be said of the provisions of the license agreement prohibiting alcoholic beverages. We do not believe they created a mandatory duty. (p. 21-22)

The Supreme Court of Colorado relied on *Bradshaw* and *Baldwin* in deciding *University of Denver v. Whitlock (1987)*. *Whitlock* involved an intoxicated student who was injured after a trampoline accident in the front yard of a fraternity house leased from the university. The court examined both the relationship between the student and the University and the lease between the University and the fraternity to assess whether a special duty relationship existed upon which negligence could be based. Ruling that no special relationship existed, the court reasoned that there was nothing in the University's handbook that "...reflects an effort by the University to control the risk-taking decisions of its students in their private recreation" (p. 60) or anything in the lease that would provide a basis for establishing a special relationship between student and institution. In affirming the general principle that to impose such a duty would run contrary to the expectations held by the public for colleges and their students, the court stated, "Here, a conclusion that a special relationship existed between Whitlock and the University sufficient to warrant the imposition of liability for nonfeasance would directly contravene the competing social policy of fostering an educational environment of student autonomy and independence" (p. 62).

Other precedents have followed a similar reasoning, denying liability in instances of alcohol use by students. In *Campbell v. Board of Trustees, Wabash College (1986)*, an Indiana appeals court pointed out that there could be circumstances in which a third party could be held liable under Indiana law for injuries sustained relating to alcohol consumption, but concluded that there was no basis for institutional liability absent evidence to suggest that the defendant college provided alcoholic beverages, knew that the student would be drinking that night, or that he would be driving an automobile after becoming intoxicated. The Court emphasized that college students should and will be treated as adults by the law, responsible for their own actions. In *Allen v. Rutgers State University of New Jersey (1987)*, a New Jersey court affirmed a jury verdict in favor of university, holding that the university's maintenance of a policy

prohibiting alcohol consumption did not result in responsibility for injuries sustained as the result of its violation, nor was the institution under any common law or statutory duty to protect the student from his own voluntary intoxication. In *Rothbard v. Colgate University (1997)*, a student who was injured when he fell out a window in his fraternity house following a party at which he consumed a large quantity of alcohol did not prevail in a suit alleging that the university assumed a special duty of care. The New York appeals court affirmed a grant of summary judgment to the institution, rejecting the contention that the university had assumed a duty to control the behavior of students because its student handbook prohibited underage drinking and provided disciplinary penalties for misconduct. Noting that "this is not a case where the university encouraged its students to participate in an activity and took affirmative steps to supervise the activity," (p. 148) the court majority emphasized that the terms of the handbook expressly prohibited the conduct involved and reasoned that the plaintiff was not a child in need of supervision, but an adult who must take responsibility for his behavior.

Courts have also rejected the contention that a special duty of care is owed by the institution to students below the legal age for purchase and consumption of alcohol. In *Booker v. Lehigh University (1992)*, for example, a federal court held that the institution's implementation of a social policy prohibiting alcohol consumption did not give rise to a special duty to control the actions of underage drinkers, and addressed the "adult" status of college students who may be underage for purposes of purchasing and consuming alcohol.

> At this point, we should explain the inter-relationship between plaintiff's adult, minor, and underage status. Plaintiff, being over the age of eighteen at the time of the incident, was an adult. For all facets of life, other than purchasing and consuming alcohol, she was an adult. As to purchasing and consuming alcohol, she would be considered by many to be a minor, i.e. she was legally incompetent to participate in such activities. We believe that a better description of this status is to call her "underage." There can be no question that she was competent, legally or other wise, to decide, inter alia, whether to break the law, e.g. whether to drink alcohol. She thus makes such a decision as an adult who is merely under the legal age for consuming alcohol. (p. 238)

Other courts have rejected an institutional duty of care in alcohol-related negligence cases even when the institution might have been regarded as having responsibilities for supervision and control of students. For example, in *Albano v. Colby College (1993)*, a student who was injured after becoming intoxicated while on a college sponsored trip to Puerto Rico alleged his tennis coach and the institution owed a special duty of care to protect him from the risks attendant to drinking alcohol. The federal court affirmed summary judgment for the institution, finding that the student voluntarily chose to consume alcohol, the coach and institution did not provide the alcohol, and the consumption of the alcohol was unrelated to the tennis team's training or instruction. The Supreme Court of Utah in *Beach v. University of Utah (1986)* determined that a special duty relationship did not exist in a case involving a biology student's fall on a field trip that rendered the student a quadriplegic. The student in Beach contended that the University breached its affirmative duty to supervise and protect her once she became intoxicated on the field trip and her disorientation led to a fall from a cliff. The court maintained that while whether an

affirmative duty is owed to protect a student from his or her own actions is a manner that must be weighed in relation to the consequences for the parties and society at large. After reviewing the implications of asserting such a duty and the nature of the college-student relationship, the court concluded there was no special relationship:

> We do not believe that Beach should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education. Not only are students such as Beach adults, but also law and society have increasingly come to recognize their status as such in the past decade or two. Nowhere is this truer than in the relations between the students and institutions of higher education. (p. 418)

While these cases clearly establish that appellate courts will not hold colleges and universities responsible for injuries sustained by students as a result of their illegal consumption of alcohol, changing social policies and awareness of the epidemic proportions of binge drinking may influence courts to reexamine institutional liability in this context. The basis for rejecting liability is the presumption that students are adults, and colleges and universities are not expected to act in loco parentis to prohibit this conduct. While courts have been uniform in rejecting institutional liability, there are ominous signs that institution might be held to a duty of care when they exercise a degree of supervision and control over student activities. For example, in *Coghlan v. Beta Theta Pi Fraternity (1999)*, the Supreme Court of Iowa considered a case in which an underage student was furnished alcohol at several fraternity parties. The student became intoxicated and later fell from a fire escape at her sorority house, sustaining permanent injuries. Among her claims was an assertion that university employees were present at the parties as supervisors and observed her and other minors being served alcoholic beverages in violation of state law and university policies. The court found the allegations sufficient to support an inference that the university assumed a duty to exercise reasonable care to safeguard the underage plaintiff from the criminal acts of third parties (furnishing alcohol to minors). In remanding the case, the court ruled the lower court had erred in dismissing the claim, but reach no conclusion that an assumed duty existed.

Conclusions

Judges have recognized that once higher education administrators abandoned in loco parentis supervision of adult students and recognized the students' right to control and regulate their own lives; colleges and universities could no longer be charged with a special duty of care to supervise student activities. Clearly, the college or university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property, particularly when it elects to promote, sponsor, or control those activities.

In the context of negligent liability, the duty of care imposed on institutions is influenced by a range of factors, including judicial awareness of the degree of risk involved and the public policy that will result from a precedent extending or expanding liability. In the modern era, higher education institutions have become increasingly concerned with student welfare, in part because of societal awareness of activities like hazing and binge drinking on campus. Concurrently, institutions of higher education seek to attract students through the provision of a range of programs and services that include study abroad,

community service and external internships. These and other extracurricular activities are often described in institutional brochures and guides as key elements in student development and socialization. Increasingly, higher education administrators emphasize an "ethic of caring" in the provision of services and the supervision of student activities.

Does an institutional commitment to an "ethic of caring" heighten the risk of negligent liability for student injuries that may arise in programs coordinated, sponsored, and supervised by the college or university? Recent case law suggests that the extension of liability based on a special duty relationship is possible, particularly in cases that involve third party assaults on students, hazing, and injuries in institutionally sponsored athletic activities. It is possible that public policy will influence judges to extend liability to other contexts as well, particularly cases involving student alcohol abuse.

As higher education administrators expand the range of services and programs offered to students in higher education institutions, they should be alert to the prospect that their involvement in a culture of caring will place them in the same context as coaches and instructors who exercise a degree of supervision over their charges that heightens the risk of negligent liability. Judges have made clear that it is possible to create a duty if one voluntarily undertakes to perform an act, and to find that a duty is breached when the act is performed in a negligent manner. Although judicial recognition of a special duty relationship has been limited, institutional administrators should begin to consider what affirmative steps might be required to reduce risks and adopt risk management and risk avoidance practices commensurate with the known dangers that can result from institutional programs.

Endnotes

Adams v. State, 620 N.Y.S.2d 80 (App.Div. 1994)
Albano v. Colby College, 822 F.Supp. 840 (D. Me. 1993)
Allen v. Rutgers State University of New Jersey, 216 N.J.Super. 189, 523 A.2d 262 (N.J. App. 1987)
Alton v. Texas A & M University, 168 F.3d 196 (5th Cir. 1999)
Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal.App. 1981).
Beach v. University of Utah, 726 P.2D 413 (Utah 1986).
Bergeron v. Southeastern Louisiana University, 610 So.2d 986 (La. App. 1992)
Bloss v. University of Minnesota, 590 N.W.2d 661 (Minn.App. 1999)
Booker v. Lehigh University, 800 F.Supp. 234 (E.D.Pa.1992)
Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979)
Brueckner v. Norwich University, 730 A.2d 1086 (Vt. 1999)
Campbell v. Board of Trustees, Wabash College, 495 N.E.2d 227; (Ind. App.1986)
Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999)
Conroy v. Marquette University, 582 N.W.2d 126 (Wis.App. 1998)
Cutler v. Board of Regents of State of Florida, 459 So.2d 413 (Fla. App.1984)
Delbridge v. Maricopa County Community College, 893 P.2d 55 (Ariz.App. 1994)
Fu v. State, 643 N.W.2d 659 (Neb. 2002)
Furek v. University of Delaware, 594 A.2d 506 (Del.1991)
Garrett v. Northwest Mississippi Junior College, 674 S.2d 1 (Miss. 1996)
Hall v. Board of Supervisors, Southern University, 405 So. 2d 1125 (La.App.1981)
Harrington v. Louisiana State Board, 714 So.2d 845 (La.App. 1998)
Hartman v. Bethany College, 778 F.Supp. 286 (N.D.W.Va. 1991)
Henig v. Hofstra University, 160 A.D.2d 761, 553 N.Y.S.2d 479 (App.Div. 1990)
Howell v. Clavert, 1 P.3d 310 (Kan. 2000)

Houck v. University of Washington, 803 P.2d 47 (Wash.App. 1991)
Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3rd Cir. 1993)
Klobuchar v. Purdue University, 553 N.E.2D 169 (Ind. App. 1990)
Knoll v. Board of Regents, 601 N.E.2d 757 (Neb. 1999)
Kyriazis v. University of West Virginia, 192 W.Va. 60, 450 S.E.2d 649 (W. Va. 1994)
McNeil v. Wagner College, 667 N.Y.S.2d 397 (App.Div. 1998)
Miller v. State, 466 N.Y.S.2d 436 (App.Div.1983)
Miller v. State, 478 N.Y.S.2d 829 (App.Div. 1984)
Moose v. Massachusetts Institute of Technology, 683 N.E.2d 706 (Mass. App. 1997)
Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331 (Mass.1983)
Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993)
Newman v. Ohio State University, 62 Ohio Misc.2d 162, 594 N.E.2d 173 (Ct. Claims 1991)
Nisbet v. Bucher, 949 S.W.2d 111 (Mo.App. 1997)
Nova University v. Katz, 636 So. 2d 729 (Fla.App. 1993)
Nova Southeastern University v. Gross, 758 S.2d 86 (Fla. 2000)
Obiechina v. Colleges of the Seneca, 652 N.Y.S.2d 702 (Sup. Ct.1996)
Ochoa v. California State University, 85 Cal. Rptr.2d 768 (Cal.App. 1999)
Oja v. Grand Chapter of Theta Chi Fraternity, 667 N.Y.S.2d 650 (Sup. Ct. 1997)
Pensacola Junior College v. Montgomery, 539 So.2d 1153 (Fla.App. 1989)
Rabel v. Illinois Wesleyan University, 514 N.E.2d 552 (Ill.App. 1987)
Relyea v. State, 385 So.2d 1378 (Fla. App. 1980)
Rendine v. St.John's University, 735 N.Y.S.2d 173 (App.Div. 2001)
Rothbard v. Colgate University, 652 N.Y.S.2d 146 (Sup.Ct. 1997)
Ruchalski v. Schnectady County Community College, 656 N.Y.S.2d 784 (App.Div. 1997)
Schiffman v. Spring, 609 N.Y.S.2d 482 (App. Div. 1994)
Searles v. Trustees of St. Joseph's College, 695 A.2d 1206 (Me. 1997)
Sharkey v. Board of Regents, 615 N.W.2d 889 (Neb. 2000)
Smith v. Day and Norwich University, 148 Vt. 595, 538 A.2d 157 (Vt. 1987)
Trustees of Trinity College v. Ferris, 491 S.E.2d 909 (Ga.App. 1997)
University of Denver v. Whitlock, 829 F.2d 1340, (4th Cir. 1987)
Wallace v. Broyles, 961 W.S.2d 712 (Ark. 1998)

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